

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GEORGE M.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. C20-5037 RAJ

**ORDER REVERSING AND
REMANDING FOR FURTHER
ADMINISTRATIVE
PROCEEDINGS**

Plaintiff appeals denial of his application for Disability Insurance Benefits.

Plaintiff contends the ALJ erred by rejecting his testimony, a lay witness statement, and a medical opinion. Dkt. 7. As discussed below, the Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

BACKGROUND

Plaintiff is 56 years old, has a high school education, and has worked as a heavy equipment operator. Dkt. 5, Admin. Transcript (Tr.) 27-28. Plaintiff alleges disability as of March 28, 2016. Tr. 19. After conducting a hearing in November 2018, the ALJ issued a decision finding Plaintiff not disabled. Tr. 186-229, 19-29. In pertinent part, the

1 ALJ found Plaintiff had severe impairments of neurocognitive disorder, headaches,
2 bilateral carpal tunnel syndrome, spinal disorders, and adjustment disorder. Tr. 21. The
3 ALJ restricted Plaintiff to simple, light work with frequent handling and fingering. Tr.
4 23.

5 DISCUSSION

6 This Court may set aside the Commissioner's denial of Social Security benefits
7 only if the ALJ's decision is based on legal error or not supported by substantial evidence
8 in the record as a whole. *Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir. 2017).
9

10 A. Examining Psychologist Lezlie A. Pickett, Ph.D.

11 After examining Plaintiff in August 2017, Dr. Pickett diagnosed "Neurocognitive
12 Disorder, Mild, due to traumatic brain injury" (TBI) and adjustment disorder. Tr. 601-02.
13 She opined Plaintiff had "significant deficits" in memory function after 20 to 30 minutes'
14 delay, which "impaired his ability to maintain the pace and persistence required of
15 general employment environments." Tr. 602-03. The ALJ found Dr. Pickett's opinions
16 "not persuasive" because the ALJ found there had been no TBI and because her opinions
17 were inconsistent with Plaintiff's activities. Tr. 25-26. The parties dispute whether the
18 ALJ could discount Dr. Pickett's opinions only for "specific and legitimate" reasons, or
19 by assessing the supportability of the opinions and their consistency with the record. *See*
20 *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017); 20 C.F.R. § 404.1520c(a). The
21 Court need not address the dispute because, under either standard, the ALJ's reasons
22 were insufficient.
23

1 **1. Traumatic Brain Injury**

2 There is no dispute Plaintiff's severe impairments include "neurocognitive
3 disorder, mild" and adjustment disorder. Tr. 21. The ALJ failed to explain how
4 determining whether the underlying cause of the neurocognitive disorder was TBI or
5 another cause would undermine Dr. Pickett's opinions. Even if the ALJ is correct that
6 there was no TBI, this does not undermine the supportability of Dr. Pickett's opinions,
7 which were based on undisputed impairments, and is not a specific and legitimate reason
8 to discount Dr. Pickett's opinions.
9

10 **2. Activities**

11 The ALJ found Dr. Pickett's opinions "inconsistent with the claimant's activities,
12 which include driving a car, hunting and fishing, and going on road trips." Tr. 26. None
13 of these activities require the type of pace and persistence necessary for employment that
14 Dr. Pickett opined were impaired. This does not show inconsistency between Dr.
15 Pickett's opinions and the record, and was not a specific and legitimate reason to discount
16 her opinions.

17 The Court concludes the ALJ erred by discounting Dr. Pickett's opinions.

18 **B. Plaintiff's Testimony**

19 The ALJ could only discount Plaintiff's testimony as to symptom severity by
20 providing "specific, clear, and convincing" reasons supported by substantial evidence.
21 *Trevizo*, 871 F.3d at 678. The ALJ provided several reasons, none of which were clear
22 and convincing.
23

1 First, the ALJ discounted Plaintiff's testimony for lack of "proof that he ever hit
2 his head." Tr. 24. There is no dispute Plaintiff suffered a workplace injury in December
3 2015, while working as a heavy equipment operator. Plaintiff was standing on a crane
4 truck when a car hit it, and was thrown onto the highway. Tr. 197. Plaintiff testified he
5 has no memory of what happened immediately upon impact but believes he "had to have"
6 hit his head based on where he was when impact occurred and the fact that he had a
7 headache and nausea after the incident. Tr. 197-99. There is no dispute Plaintiff's brain
8 was affected by the impact. *See* Tr. 24 (ALJ cited evidence of "post-concussive
9 syndrome as opposed to a significant head injury"). Determining whether there was
10 direct impact to Plaintiff's head or instead his brain hit the inside of his skull due to the
11 impact on his body—when Plaintiff cannot remember what happened—is not relevant to
12 assessing his testimony of symptom severity. The Commissioner does not defend the
13 ALJ's reason, apparently conceding it is erroneous.

15 The ALJ found Plaintiff made inconsistent statements about whether he was able
16 to engage in hobbies. Tr. 25. Plaintiff has consistently reported he is unable to engage in
17 hunting, fishing, and motorcycle riding at the level and frequency he did before his
18 accident. For example, Dr. Pickett's report notes Plaintiff reported "he used to hunt, fish,
19 ride motorcycles, and was very physically active. Since the injury, he has not been able
20 to engage in those activities." Tr. 599. In Plaintiff's July 2017 Function Report, he
21 explained he hunts, fishes, or rides motorcycles "not very often and not near as well as
22 [he] used to. ... Everything has changed from pain. Can only do easy hunt & fish so [he
23

1 doesn't] catch or kill animals like [he] used to." Tr. 378. In a November 2017 Function
2 Report Plaintiff explained he "ha[s] to take the easiest way possible to do [these
3 activities]. It often ends in failure now." Tr. 428. Even if there was a minor discrepancy
4 between being able to do these activities a little or not at all, a "single discrepancy fails
5 ... to justify the wholesale dismissal of a claimant's testimony." *Popa v. Berryhill*, 872
6 F.3d 901, 906–07 (9th Cir. 2017). Inconsistent statements were not a clear and
7 convincing reason to discount Plaintiff's testimony.

8
9 The ALJ discounted Plaintiff's testimony because his "low back pain nearly
10 resolved" one year after his October 2016 lumbar spine surgery. Tr. 25 (citing Tr. 642).
11 Plaintiff testified this first lumbar surgery was successful and provided relief, but the
12 second surgery only provided relief "for about three/four weeks and then it was worse."
13 Tr. 202. Successful relief of symptoms was not a clear and convincing reason to discount
14 Plaintiff's testimony. *See Wellington v. Berryhill*, 878 F.3d 867, 876 (9th Cir. 2017)
15 ("[E]vidence of medical treatment successfully relieving symptoms can undermine a
16 claim of disability."); *Holohan v. Massanari*, 246 F.3d 1195, 1205 (9th Cir. 2001)
17 (Making "some improvement does not mean that the person's impairments no longer
18 seriously affect her ability to function in a workplace.").

19
20 An ALJ may discount a claimant's testimony based on daily activities that either
21 contradict her testimony or that meet the threshold for transferable work skills. *Orn v.*
22 *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). The ALJ cited going on a road trip, but failed
23 to explain how this contradicts Plaintiff's testimony of, for example, his legs giving out,

1 hand tremors, and headaches. Tr. 25. Conflict with his activities was not a clear and
2 convincing reason to discount Plaintiff's testimony.

3 Finally, the ALJ discounted Plaintiff's physical symptom testimony based on only
4 mild abnormalities in imaging and other clinical tests. Tr. 24-25. However, "lack of
5 medical evidence cannot form the sole basis for discounting pain testimony...." *Burch v.*
6 *Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). In the absence of any other clear and
7 convincing reason, mild clinical results were not a sufficient reason to discount Plaintiff's
8 testimony.

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10 The Court concludes the ALJ erred by discounting Plaintiff's testimony.

11 **C. Lay Witness Statement**

12 An ALJ may discount lay witness testimony for germane reasons. *Diedrich v.*
13 *Berryhill*, 874 F.3d 634, 640 (9th Cir. 2017). Plaintiff's fiancé filled out a Function
14 Report in July 2017, describing hand tremors, confusion, and pain that sometimes makes
15 him collapse. Tr. 398-405. The ALJ discounted this lay witness statement as "not
16 entirely consistent with the medical record," but failed to specify any conflicts. Tr. 27.
17 The Commissioner argues "normal" hand and wrist clinical findings contradicted
18 Plaintiff's fiancé's description of hand tremors. This is a *post hoc* argument on which the
19 Court cannot rely and, moreover, is unsupported because the cited record does not
20 contradict hand tremors. *See Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1225
21 (9th Cir. 1995); Tr. 1116, 1121. The Commissioner argues the ALJ's reasons to discount
22 Plaintiff's testimony apply equally well to his fiancé's statements. Because the ALJ
23

1 failed to provide an adequate reason to discount Plaintiff's testimony, the
 2 Commissioner's argument fails. The Court concludes the ALJ erred by discounting the
 3 lay witness statement.

4 **D. Scope of Remand**

5 Plaintiff requests remand for an award of benefits. Before awarding benefits, the
 6 Court must determine "whether the record has been fully developed, whether there are
 7 outstanding issues that must be resolved before a determination of disability can be made,
 8 and whether further administrative proceedings would be useful." *Treichler v. Comm'r*
 9 *of Soc. Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir. 2014) (internal citations and quotation
 10 marks omitted). Plaintiff makes no attempt to show the record is fully developed and no
 11 conflicts remain. In fact, conflicts remain among medical opinions. *See, e.g.*, Tr. 602-03,
 12 1149. The Court concludes remand for further proceedings is appropriate.

14 **CONCLUSION**

15 For the foregoing reasons, the Commissioner's final decision is **REVERSED** and
 16 this case is **REMANDED** for further administrative proceedings under sentence four of
 17 42 U.S.C. § 405(g). On remand, the ALJ should reevaluate Dr. Pickett's opinions,
 18 Plaintiff's testimony, and his fiancé's statement; reassess the RFC as appropriate; and
 19 proceed to step five as necessary.

20 DATED this 9th day of September, 2020.

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23 The Honorable Richard A. Jones
 United States District Judge